

1961

# The Chemical and Industrial Corporation v. Utah State Tax Commission : Reply Brief of Plaintiff

Utah Supreme Court

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IN THE  
**Supreme Court of the State of Utah**

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**No. 9360**

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THE CHEMICAL AND INDUSTRIAL CORPORATION,  
*Plaintiff,*

v.

UTAH STATE TAX COMMISSION,  
*Defendant.*

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**REPLY BRIEF OF PLAINTIFF**

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Clerk, Supreme Court, Utah

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**REPLY BRIEF OF PLAINTIFF**

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**STATEMENT OF FACTS AND ARGUMENT**

**I. Passage of Title to the Materials Is Controlled by Article XVIII of Plaintiff's Contract, Not by the Provisions of the Contract Between United States Steel Corporation and Blaw-Knox Company.**

Although plaintiff generally agrees with defendant's statement of facts in so far as they purport to summarize various provisions of the contracts, the reason or necessity for such analysis, particularly with reference to the contract between Columbia-Geneva Division, United States Steel Corporation and The Blaw-Knox Company, remains, as it has throughout the proceedings, unclear. As defendant points out at page 3 of its brief, the time of passage of title to the materials purchased is critical, yet nowhere in the contract between United States Steel and Blaw-Knox is there any provision which purports to deal with this question. Repeated discussion and emphasis on provisions of this contract by the defendant which clearly

deal with matters extraneous to the matter of passage of title, tends only to confuse the real question in issue here.

The attempt by the defendant to read into the contract between United States Steel and Blaw-Knox a provision which does not exist stems from its position "that it is impossible to impose upon United States Steel Corporation terms to which it did not agree." Apparently, the defendant is of the opinion that no one can be subjected to a liability for the payment of taxes unless it expressly agrees to the imposition of such taxes. In this opinion the defendant is obviously in error. These taxes are imposed by law, as enacted by the legislature of the State of Utah, and as interpreted by the courts of this state. The parties to a contract do not and cannot impose such taxes. They can only contract in such a manner as to either effect their dealings or transactions in such a way that liability *under the law* is more or less clearly imposed upon one party, or they may agree that one party will bear the *ultimate liability* for such taxes.

United States Steel Corporation, with knowledge that there would be subcontracts of the work to be performed under the prime contract, was not in a position to exercise complete control over the *transactions* which would result in tax liability under the law. It was, however, in a position to protect itself from the *ultimate liability* for the payment of any taxes. This it did by the inclusion of Paragraph 15 of its contract with Blaw-Knox which required Blaw-Knox to indemnify and hold it harmless from liability for any such taxes. It thereby imposed the *economic* burden of the taxes on Blaw-Knox, and thus eliminated from consideration an element of price that was contingent and uncertain.

In the same manner, plaintiff, by limiting its liability to taxes "levied upon" it, restricted the area of its

*ultimate liability* for the payment of such taxes. This was, as it is in all such contracts, an important factor in the prices quoted by The Chemical and Industrial Corporation in its bid for the job. It is plaintiff's position in this matter that there can be no valid levy of a use tax against it.

An examination of the provisions of the contract quoted by the defendant separately, or of the instrument as a whole, fails to support the defendant's contention that title to the materials did not pass to United States Steel Corporation until "final acceptance" of the work. Paragraph 1 entitled "Description of the Work" is no more than that: a description of the duties of the contractor. Paragraph 12 simply places the obligation of insuring the work during construction on the contractor, a standard provision in many construction contracts. Paragraph 4 is a typical default provision, authorizing the owner to complete the contract in the event of a default of the contractor.

The defendant has placed considerable emphasis on Paragraph 24, relating to the final acceptance of the work. Apparently it is its contention that no interest in the facility passed to United States Steel Corporation until it accepted the plant pursuant to Paragraph 24. The fallacy of this reasoning has been discussed in detail in plaintiff's original brief and it would serve no useful purpose to prolong the discussion of this point here. Suffice it to say that the quoted portion of this provision set forth in defendant's brief at page 11 makes it quite clear that "acceptance" relates only to an agreement on the part of the owner that the operating plant meets the specifications contained in the contract as to operating performance and efficiency and as to the quality of the finished product produced by the plant.

The further reference to Sales and Use Tax Regulation No. 58, as a basis for imposing liability on The Chemical and Industrial Corporation in this instance, is particularly

inappropriate here since this Regulation, in its quoted form, was not approved until May 27, 1959 and is expressly made effective only on or after July 1, 1959. Prior to this time the predecessor of this particular regulation was expressly made applicable only to the sales tax, and did not contain the second sentence set forth in the quoted material.

## **II. Defendant's Interpretation of the Meaning and Effect of Article XVIII of the Contract Between Plaintiff and the Blaw-Knox Company Is Erroneous.**

As plaintiff indicated in its original brief, and contrary to the statement of the defendant at page 16 of its brief, plaintiff contends that the title to the materials here involved passed upon delivery, rather than at the time they were delivered *and stored* at the site. Plaintiff believes, however, that irrespective of whether title passed upon delivery or at the time the materials were delivered **and stored**, no taxable moment existed when plaintiff could be subjected to liability for the tax imposed in this case. If plaintiff is correct that title passed upon delivery, then any reference to the provisions of the use tax law relating to storage are extraneous. But even if title did not pass until the materials were delivered and stored, there would still be no taxable moment when plaintiff was subject to the tax.

Plaintiff has shown that even a tax on storage, in order to be valid, must be a tax imposed on the exercise of a right of ownership in property. In the present context, the question then becomes: when were the materials stored? The answer is, of course, when they were placed on the ground at the job site after the termination of their transit in interstate commerce. *Mud Control Laboratories v. Covey*, 2 Utah 2d 85, 269 P. 2d 854 (1954), cited at page 13 of plaintiff's brief. At this precise instant title to the materials was in the United States Steel Corporation.

In this connection, your attention is directed to the decision of the United States Supreme Court in *Nashville, Chattanooga & St. L. R.R. v. Wallace*, 288 U. S. 249 (1933). Here the State of Tennessee asserted liability for an excise tax on the storage of gasoline imported by the petitioner from other states and unloaded by it into storage tanks from which it was subsequently withdrawn and used by petitioner to provide motive power for its equipment used in interstate operations. In upholding the tax, the Court stated at 266:

The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. . . . The oil in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation.

And again at pages 267-8:

The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. . . . Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce. Here the tax is imposed on the successive exercise of two of these powers, the storage and withdrawal from storage of the gasoline.

Thus, it is apparent that for tax purposes, storage does not take place until the materials are placed in storage. Furthermore, it is equally clear that in order for the tax to apply, the storage must be that of the owner of the property. In the present case, the essential element of ownership was lacking, and, therefore, the tax cannot be applied to the plaintiff.

### III. Defendant's Argument that There Was a Taxable Moment When Plaintiff Was the Owner of the Materials and Subject to a Tax Is Not Supported by the Authorities.

The defendant relies principally on the decisions in *Southern Pacific Co. v. Gallagher*, 306 U. S. 167 (1939) and *Pacific Telephone & Telegraph Co. v. Gallagher*, 306 U. S. 182 (1939) to support its contention that plaintiff was the owner of the materials during a taxable moment when it was subject to the tax sought to be imposed here. An analysis of these cases and the decisions following and interpreting them, however, do not support this contention. These decisions of the Supreme Court clearly taxed the exercise of two rights of ownership: (1) storage, or the retention of materials after the interstate transit ended; and (2) use, or the subsequent installation of the materials in the taxpayer's operations, both of which occurred subsequent to a "taxable moment" after the delivery of the materials and after the interstate transportation of them ended. This is the interpretation placed on these cases by this Court. See *Union Pacific R.R. v. Utah State Tax Commission*, 110 Utah 99, 169 P. 2d 804 (1946) and *Southern Pacific Co. v. Utah State Tax Commission*, 106 Utah 451, 150 P. 2d 110 (1944).

Further, in this connection the language of the court in the decision of *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal. 2d 162, 119 P. 2d 945 (1941) cited by the defendant, is particularly appropriate. Here, the petitioner, a builder of storage tanks and qualified to do business in California, shipped tanks in a "knocked down" condition to a point at or near its customer's premises where they were unloaded and stored pending reassembly by plaintiff on the site. In holding plaintiff subject to the California use tax, the court stated at 170, 119 P. 2d at 949:

In the instant case the tax was levied on the storage and use of the materials which were purchased and fabricated into tank parts, that storage and use consisting of the time after the materials arrived and while they were awaiting assembly and erection by the plaintiff, and the subsequent installation and erection thereof. The interstate transit had ended when the tank parts arrived at their destination near and/or adjoining the customer's premises and awaited assembly in so far as their being subject to the tax was concerned. *That was the commencement of the taxable moment; that was the taxable intrastate event which occurred after the interstate transit had ceased.* (Emphasis added.)

#### **IV. The Contention of the Defendant that Plaintiff Was Present in the State of Utah Is Without Basis in Fact, and There Is No Authority for Such Position in Law.**

The defendant has apparently based its contention that plaintiff was present in the State of Utah solely upon the basis of a decision rendered by the Supreme Court of the United States some 33 years ago, and which decision does not involve the application of a use tax but rather is concerned with a question of the validity of the imposition of a fine or penalty for failure to timely qualify to do business within the State of Arkansas. The defendant has quoted at length from this decision in support of its contention that plaintiff was engaged in business in the State of Utah.

Upon closer examination of the facts involved in this decision, *Kansas City Structural Steel Co. v. Arkansas*, 269 U. S. 148 (1925), the dissimilarity between the situation which existed there and in the present case becomes quite obvious. In addition to the fact that the Court was concerned with the application of a penalty provision for failing to qualify to do business at the proper time rather

than with the application of a state use tax, it is apparent from the opinion that the Kansas City Structural Steel Company, against whom the penalty was assessed, went considerably further in its operations within the State of Arkansas than has plaintiff here in the State of Utah. In that case, the plaintiff submitted a bid to a governmental agency in Arkansas for the construction of a bridge in that state. The bid and the contract covering the work were executed in Arkansas. Materials were shipped from Missouri to a point near the site of construction in Arkansas and were received by the plaintiff at this point. Thereafter such materials were delivered by the plaintiff to its subcontractor and were ultimately used in the performance of the contract.

In the present case plaintiff submitted no bid to anyone in the State of Utah nor was any bid accepted or contract executed within the State of Utah. Nor did plaintiff here subcontract only a portion of the work retaining some actual construction work itself as did the plaintiff in the *Kansas City Structural Steel Company* case. All work to be performed by plaintiff under its subcontract with the Blaw-Knox Company was sublet to The Chemical and Industrial Construction Company and plaintiff's subcontractor was required under the terms of its contract with plaintiff to undertake not only all construction work but the receipt, unloading, and hauling of all materials to be used in connection with the work.

The materials purchased by plaintiff and ultimately used in the work were addressed and shipped to The Chemical and Industrial Construction Company at the job site near Geneva, Utah. Not only did plaintiff not receive the materials in Utah, it also did not undertake any actual or physical delivery of any materials to its subcontractor. In contradistinction to this it would appear from the opinion of the Supreme Court and the Supreme Court of Arkansas

that the plaintiff in *Kansas City Structural Steel Company* case was actually present and made actual physical deliveries of the materials to its subcontractor. This is apparent from the following quotation from the case contained in the decision of the Supreme Court of Arkansas, 161 Ark. 483, 256 S. W. 845 at 847:

Here the facts warranted the trial court in finding, and evidently it did find, that the appellant shipped the materials necessary in the construction of this bridge to Dermott, and there established the emporium or warehouse, from which it furnished to the Yancey Construction Company all the material the latter company required to do the work under its contract.

Thus, the basis for the Court's determination that the interstate shipment had ended is clear. The materials had been shipped to some point near the construction site, and there received by the plaintiff and stored temporarily until they were subsequently actually and physically delivered by the plaintiff to its subcontractor as they were needed in the course of construction. This is an entirely different situation from that involved in the present case where the only interruption in delivery from points outside the State of Utah to the job site was a possible change in the mode of conveyance from rail to truck.

Plaintiff is at a loss to understand the basis for the defendant's contention that the decision in *Kansas City Structural Steel Co. v. Arkansas, supra*, a decision rendered thirty-three years ago, not involving the application of either a use or sales tax, and not even mentioning the Fourteenth Amendment to the United States Constitution, can be urged as authority for the proposition that the attempted exaction of a use tax from plaintiff in these circumstances is a valid exercise of the taxing power and authority of the State of Utah and not proscribed by the Fourteenth Amendment to the United States Constitution.

**V. The Terms of the Contract Between United States Steel and Blaw-Knox Were Not Ambiguous, and the Testimony Elicited from Mr. Gage Was Improper.**

The defendant attempts to justify the questions directed to Mr. Maynard Gage, an employee of United States Steel Corporation, and the answers elicited from him on the ground that the contract between United States Steel Corporation and the Blaw-Knox Company was ambiguous and *incomplete*. No attempt was ever made by the defendant to establish, as a foundation for the admission of such evidence, the ambiguity of the contract, and certainly, the introduction of the evidence could not be sustained on the ground that the contract was incomplete. Plaintiff believes that it is obvious that the defendant was simply trying to add to the contract a provision it did not contain.

To say that because the plaintiff cited a provision of this contract as evidencing as much support for plaintiff's position as other provisions of the same contract cited by the defendant supported it, is in itself evidence of the ambiguity of the contract is evading the question. Plaintiff's complaint is simply that defendant, by trying to establish its position by reference to certain provisions of the contract which do not purport to deal with the matter the defendant seeks to establish, creates ambiguity. This is the natural and inevitable consequence of trying to add to the contract a provision which is not there. The ambiguity is not in the contract itself, but only arises from the defendant's attempts to prove that two plus two equals five.

Although not related specifically to any particular point here involved, the defendant at page 18 of its brief urges the affirmance of the decision of the State Tax Commission on the ground that to rule otherwise would be tantamount to opening the flood gates of tax avoidance to the great detriment of intrastate contractors and sellers of such materials. Plaintiff submits that this is not the case. First,

plaintiff wishes to make it quite clear that the avoidance of the payment of the use tax in this instance was not the reason for conducting its business in the manner in which it is carried on. This method of operation was in effect long before the project for United States Steel Corporation at Geneva, Utah was even contemplated. The design and the construction of complicated petro-chemical complexes are two separate and distinct operations, requiring different types of personnel, methods of operation, etc. Second, a holding that plaintiff is not liable for the payment of the use tax in this proceeding is *not* the equivalent of saying that no tax is due as a result of the construction of these facilities. To the contrary, it seems entirely plausible that *someone* other than the plaintiff may well owe such a tax. But liability cannot be imposed upon the plaintiff simply because a tax may be due and owing as a result of the construction work. Finally, even if it was determined that *no* tax was due in this instance by anyone by reason of a gap or omission in the law, it is not the function of either the State Tax Commission or the courts to remedy the situation. The remedy lies with the legislature of the State of Utah.

## VI. Conclusion.

Plaintiff submits that in the light of the facts and the authorities there exists no basis for the imposition of liability for the payment of the use tax in this instance on

the plaintiff, and that accordingly, the decision of the State Tax Commission should be reversed.

Respectfully submitted,

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